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CASE NO. 82-656

in the

Supreme Court

of the

United States

October Term, 1982

THOMAS P. POMEROY,

Petitioner,

vs.

SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY AND JOEL D. WARE,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Ware Letter sued on herein contains mere statements of opinion, based on disclosed or known nondefamatory facts, and is therefore immune from liability.

LIST OF PARENT, SUBSIDIARY, AND AFFILIATED COMPANIES

Respondent Southern Bell Telephone and Telegraph Company is a subsidiary of American Telephone and Telegraph Company.

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OPINION BELOW

The opinion below is reported: *Pomeroy v. Southern Bell Telephone and Telegraph Company*, 410 So.2d 647 (Fla. App. 1982), *petition for review denied*, 418 So.2d 1280 (Fla. 1982).

JURISDICTION

This Court does not have certiorari jurisdiction because the decision sought to be reviewed is based upon a nonfederal ground, *viz.* that the statements complained of are merely expressions of opinion and therefore immune from liability.

CONSTITUTIONAL PROVISIONS INVOLVED

Respondents contend that the decision below was based on state law and therefore does not involve any constitutional provision.

STATEMENT OF THE CASE

Petitioner's complaint attempted to allege libel and slander[1] grounded upon a letter ("Ware Letter") written by Joel Ware, vice-president of Southern Bell, to Roger Carlton, Executive Assistant to the Dade County Manager, complaining about the County bid evaluations performed by Thomas Pomeroy as Supervisor of the Telecommunications Division of Metropolitan Dade County. More specifically, Mr. Ware opines in his

[1]Although other claims were raised in his complaint, petitioner herein complains only of the dismissal of the libel and slander counts.

letter that the County bid evaluations "are being grossly biased against Southern Bell by Tom Pomeroy," and further states "I have personally reviewed the details of some of these evaluations and formed this opinion."

In their motion to dismiss the complaint, respondents raised the First Amendment right to petition the government for redress of grievances and the applicability of the *New York Times* standard of actual malice. Both the trial court and the Third District Court of Appeal, however, decided that the Ware letter contained only statements of opinion and thus was not actionable.

The complaint was dismissed by the trial court. The Third District Court of Appeal affirmed, holding that:

> the allegedly defamatory statements sued upon were no more than expressions of opinion and were therefore properly determined to be non-actionable as a matter of law.

The Florida Supreme Court declined jurisdiction to review the decision of the Third District Court of Appeal.

SUMMARY OF ARGUMENT

The only question involved in this case is whether the Ware Letter is an expression of pure opinion and therefore immune from liability under state law. The Florida courts have not misconstrued this Court's First Amendment decisions to create a blanket immunity for statements of opinion implying undisclosed defamatory facts, and that issue is not presented in this case.

Furthermore, even if the immunity afforded pure statements of opinion is deemed to be a federal question, this Court should not accept jurisdiction because the decision below does not conflict with any decisions of this Court nor present any undecided question of public importance.

ARGUMENT

I. THE DECISION IS BASED UPON STATE LAW.

Although substantial federal questions were raised below by respondents in their motion to dismiss the complaint, including the First Amendment right to petition the government of redress of grievances and the applicability and extent of the protection afforded statements about public officials in *New York Times v. Sullivan*, 376 U.S. 254 (1964), this case was decided on the independent nonfederal ground that the statements complained of are merely opinions and are therefore immune from liability.

The interpretation of allegedly defamatory statements, and the immunity afforded expressions of opinion, is a question of state law so long as that law does not impinge upon First Amendment considerations. Petitioner's contention is not that any First Amendment protections have been violated, but rather that the Florida courts have misconstrued the First Amendment and the *dicta* of this court in *New York Times*, *supra* and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) to afford *too much* protection to allegedly defamatory statements. But while *New York Times* and *Gertz* may provide the more eloquent and authoritative statement of the proposition that statements of pure opinion are

immune from liability, and have frequently been cited for that proposition, this immunity was recognized by the Florida Supreme Court, without resort to any federal authority, as early as 1956. In *White v. Fletcher*, 90 So.2d 129, 131 (Fla. 1956), the Florida Supreme Court noted, albeit in dicta,

> It appears from the record that in the first instance Fletcher's comment might well constitute merely an "opinion or inference from facts assumed to be true" and be, therefore, immune from liability for defamation. 53 C.J.S., Libel and Slander, §131(3).

Because the decision herein found the Ware Letter to be no more than an expression of opinion and therefore nonactionable as a matter of law, there is no constitutional question to be reviewed.

II. CERTIORARI SHOULD BE DENIED.

Moreover, even if the First Amendment immunity afforded expressions of opinion is deemed by this Court to be involved in this decision, certiorari should be denied because the decision is manifestly correct and because this case does not present an appropriate vehicle for correction of any perceived misconstruction of this Court's decisions in *New York Times* and *Gertz*.

First, petitioner's statement of the question presented is wholly extraneous to the record herein. The Florida courts have not held, and did not hold in this case, that "an opinion which implies the allegation of undisclosed defamatory facts as its basis [is] absolutely

privileged." Rather, the Third District Court of Appeal held that the Ware Letter contained "no more than expressions of opinion." 410 So.2d at 648.

By misconstruing the decision herein as creating a blanket immunity for expressions of opinion, petitioner attempts to create a federal question. A review of the full text of the statements complained of, as set forth in the opinion of the Third District, reveals the correctness of that court's holding. This case does not concern the immunity afforded expressions of opinion which are based on undisclosed defamatory facts. As is obvious from the Ware Letter, the only "facts" underlying the opinion contained therein are the County bid evaluations prepared by petitioner, which are incapable of being defamatory of petitioner. Petitioner's attempt to rewrite the Ware Letter to imply undisclosed defamatory facts has been rejected by three Florida courts. That attempt must fail here as well, not only because the implication is groundless, but because the issue, affecting as it does *only* Pomeroy and Ware, is of insufficient public importance to warrant certiorari review.

This Court's decisions in both *Gertz, supra* and *New York Times, supra*, have indicated by *dicta* that expressions of pure opinion are protected by the First Amendment. Any backtracking by the Court at this point would throw the issue into unnecessary chaos and, respondents submit, spawn serious impediments to the free exchange of ideas. This Court's dicta has been properly relied upon by both federal and state courts throughout the United States, albeit frequently with coexistent state law support, to deny relief for statements which are nothing more than opinions and do not imply the existence of undisclosed defamatory facts.

Petitioner has pointed to no case involving the "simplistic fact/opinion dichotomy" which he so strenuously asserts must be corrected by this Court now. Indeed, one of the cases relied upon by the court below, *From v. Tallahassee Democrat, Inc.*, 400 So.2d 52 (Fla. App. 1981), *pet. for review denied*, 412 So.2d 465 (Fla. 1982), took great care to set forth the precise rule of law which petitioner erroneously contends has been ignored by the Florida courts.

> *Gertz* would indicate that expressions of opinion are privileged and protected by the Constitution. There is, however, a distinction between pure expression of opinion and mixed expression of opinion. *Pure opinion occurs when the defendant makes a comment or opinion based on facts* which are set forth in the article or *which are otherwise known or available to the reader or listener* as a member of the public. Mixed expression of opinion occurs when an opinion or comment is made which is based upon facts regarding the plaintiff or his conduct that have not been stated in the article or assumed to exist by the parties to the communication. Restatement (Second) of Torts, §566, pp. 171-172.

400 So.2d at 57. (emphasis added). This is a correct statement of the law of Florida as it existed before the *Gertz* opinion, and since then. This same distinction applied to the facts of this case reveals that only pure opinion is involved herein and the decision sought to be reviewed is eminently correct. Should this Court perceive any error in the rule of law stated in *From* and applied herein, its correction ought to abide a record, unlike ours, in which the allegedly defamatory statements *do*

imply the existence of undisclosed defamatory facts which are not known to the audience.

Finally, it should be observed that were this Court to grant certiorari, any opinion contrary to the decision of the Florida court herein will require a consideration of the constitutional questions eschewed below, *viz.* 1) the immunity afforded legitimate petitions to the government for redress of grievances suffered at the hands of a public employee in the performance of his official duties, and 2) whether or not petitioner is a public official to whom the *New York Times* standard is applicable, and if so, whether or not a different standard for evaluating the immunity afforded the statements is applicable.[2] Thus, even if a dispositive opinion on the extent of constitutional immunity afforded to statements of opinion is deemed advisable, it should not be rendered in this case because to do so will necessarily raise other constitutional issues before they are fully developed.

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[2]In obeisance to this Court's mandate of brevity, respondents have not addressed the merits of these issues, but would request permission to do so in the event that certiorari is granted.

CONCLUSION

For the foregoing reasons, respondents respectfully submit that certiorari should be denied.

Respectfully submitted,

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